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**Intra-Professional Status, Maintenance Failure, and the Reformation of the Scottish  
Civil Justice System**

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# **Intra-Professional Status, Maintenance Failure, and the Reformation of the Scottish Civil Justice System**

## **ABSTRACT**

The Scottish civil justice system is undergoing its most substantive transformation in over 150 years. This reformation will create new judicial bodies, alter the jurisdictional reach of courts, and drastically unsettle what has been, up to now, a highly stable institutional field. These changes have caused pronounced threats to the status of different groups of actors in the field. Our work examines the impact of these threats, and the varying responses among groups of professional actors. In so doing, we detail how intra-professional status differences and uncertainty hindered attempts to maintain threatened institutions.

Key words: Institutional maintenance failure; professional status; institutional change

## **Intra-Professional Status, Maintenance Failure, and the Reformation of the Scottish Civil Justice System**

In 2014, the Scottish Parliament passed legislation to thoroughly reform its civil justice system. The system had been criticised as being antiquated and of causing “erosion in public confidence” (Gill, 2009: ii). The reforms came after an extensive review of the civil legal system led by the country’s leading judge, Lord Brian Gill.

The civil justice system in Scotland is a Victorian model that had survived by means of periodic piecemeal reforms. But in substance its structure and procedures are those of a century and a half ago. It is failing the litigant and it is failing society. (Gill, 2009a)

The Courts Reform (Scotland) Act is designed to bring pronounced change to a legal system that has been in place for 150 years. Most notably, the reforms will introduce two new judicial courts (a Sheriff Appeal Court and a Special Personal Injury Court) and a new tier of judiciary, Summary Sheriffs. Further, regional Sheriff Courts, which previously could only hear civil claims up to a value of £5000, will now be able to hear cases of up to £100,000. This last change is particularly significant as it means that higher value, more complex, cases previously handled by advocates in the Scottish High Court can now be contested by solicitors in lower level courts.

The media have been consistent in their assessment of the magnitude of the changes, describing them as “sweeping reforms” (*The Scotsman*, 2014) that will “modernise” (BBC, 2014) “shakeup” (Brodies, 2009) and have “a massive impact on civil justice” (*Inhouselawyer*, 2010). Gill acknowledged the radical nature of the reforms while addressing the deeply rooted jurisdictional competition within the legal profession, stating:

Yes, it presents radical reform. But it has to be radical to ensure real change rather than piecemeal reform. What opportunity does it present? It throws open to every solicitor in Scotland a large tranche of work that hitherto has been the exclusive preserve of the Bar<sup>1</sup> and of solicitors with rights of audience in the higher courts<sup>2</sup>. It gives to every solicitor in Scotland the opportunity to develop skill in appellate advocacy and to develop an expertise that has hitherto been seen as the exclusive preserve of the Bar. (Gill, 2014: 7)

As Harel (2014) rightly emphasizes, the legal system is important because it contours desirable outcomes, such as justice, security and prosperity. For Lord Gill (2009), achieving

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<sup>1</sup> When legal professionals complete a set amount of additional training and pass associated exams, they are “called to the Bar” as advocates.

<sup>2</sup> So called ‘solicitor advocates’.

these lofty goals in Scotland involved the creation of more effective decision-making processes, and a more democratic legal system. Hence, the Scottish civil justice reforms have been designed with the intent of generating wider, cheaper and quicker access to the legal system for members of the public.

The present paper is part of a larger study taking advantage of this empirical opportunity to observe in real time how major institutional changes unfold. The overarching motivation of the study is to understand the processes of institutional maintenance and change, with particular interest given to the political behaviours of affected professions. In the present paper, we report and discuss two early and surprising observations.

As might be expected, the legal profession is not homogenous but contains groups that have their own identities that are associated with differences of status (Currie, Lockett, Finn, Martin, and Waring, 2012; Ferlie, Fitzgerald, Wood, and Hawkins, 2005; Greenwood, Suddaby and Hinings, 2002). Because status brings with it privileges and benefits, “status maintenance concerns are central” for those with higher status (Blader and Chen, 2011: 1041; see also Washington and Zajac, 2005). Changes that threaten to disrupt that status hierarchy, therefore, such as those intended for the Scottish civil justice system, can be expected to generate significant resistance. As Micelotta and Washington (2013) found in their study of Italian law firms, the legal profession is a powerful actor – even in its relationship with the state. In Italy the profession managed to “repair” a “broken” institutional order caused by new legislation even though “the law had already been passed and there was no room for negotiation” (Micelotta and Washington, 2013: 1149). Further, status hierarchies often remain entrenched in professions for long periods of time, reflecting the motivation and ability of high status actors to maintain their privileged positions, as Delmestri and Greenwood (2016: 8) illustrated:

‘Ivy League’ schools, a category of universities in the US, for example, have retained their prominence. So, too, have the ‘Magic Circle’ of UK law firms and the ‘Big Four’ international accounting firms. ‘Oxbridge’ and elite UK ‘public schools’ (such as Eton and Harrow), ... and the Grande Écoles, a category of higher education institutions in France, have similarly retained their privilege and prestige for centuries (Kodeih and Greenwood 2014). Malter (2014) notes that the *grandes crus classés* of the Médoc, five growth classes of wine producers, have remained virtually unchanged for 150 years.

It might be expected, therefore, that those with high status within the legal profession in Scotland would be agents of resistance and maintenance, whereas those with lower status would be supportive of change. We thus expected to observe “institutional maintenance work” (Lawrence and Suddaby, 2006) from some members of the legal profession, but not others. In fact, this outcome was not found. Both high *and* low status groups within the legal profession were critical of the proposed changes and both preferred retention of existing arrangements. That is, the legal profession as a whole favoured institutional maintenance. That was the first of the two surprising observations that we discuss in this paper. The second was that, despite the lack of support for change, there was little effective ‘maintenance work’. Contrary to the portrayal of the professions as “Lords of the Dance” (Scott, 2008) and as highly motivated and effective in maintaining their privileges, resistance in our study was weak and ineffectual. These observations led us to consider the following research questions. First, rather than take external shocks and their consequent impact on institutional settlements for granted, what are the intra-professional dynamics that precipitate institutional change or stasis? Second, why do actors who have power, opportunity and resources to resist change, and in whose interests it is to maintain an institution, fail to do so? Third, how do intra-professional status and identity differences influence the success or failure of attempts at institutional maintenance?

In addressing these questions, we respond to calls for research about institutional maintenance (Lawrence, Suddaby and Leca, 2009) and in particular to investigating the importance of professions as institutional agents (Scott, 2008). Moreover, we draw upon the surprisingly thin literature on professional identity and offer insights on intra-professional segmentation and its consequences for institutional processes.

Our work makes several contributions to our understanding of institutions and professions. First, we show how professions are demarcated into communities with different levels of status that are grounded in pronounced bases of identity. As a consequence, institutional maintenance requires strong, coordinated action across these communities. Second, we reveal how status differences foment intra-professional rivalries that prevent coordinated action, even when there is universal opposition to a proposed change. Third, we demonstrate that lower status groups do not automatically support change, even when it appears to be in their best interests to do so. Finally, we show that while uncertainty provides opportunities for institutional change, it hinders institutional maintenance efforts.

## **THEORETICAL FRAMEWORK**

### **Institutions, Institutional Change and Institutional Work**

Institutions are complex self-reproducing social structures underpinned by regulative, normative and cultural-cognitive elements that give meaning to social exchange, provide stability, guide behavior, and create repetitive social behaviors (Greenwood, Oliver, Suddaby and Sahlin-Andersson, 2008; Scott, 2013). They constitute communities defined by common functional, relational and cognitive criteria (Mazza and Pedersen, 2004) and thus provide governance systems that deliver frames of reference that shape individuals' sensemaking, interpretation and decision-making processes (Thornton, Ocasio and Lounsbury, 2012).

Recent work has portrayed institutions as sources of, and entrained to, different institutional logics, the “material practices and symbolic systems including assumptions, values, and beliefs by which individuals and organizations provide meaning to their daily activity, organize time and space, and reproduce their lives and experiences” (Thornton et al., 2012: 2). In other words, institutional logics prescribe an interpretation of reality, appropriate behavior and the definition of success in a given context (Friedland and Alford, 1991; Greenwood, Raynard, Kodeih, Micelotta, and Lounsbury, 2011). Logics act as guidelines for institutional actors for interpreting and functioning in social situations, including whether to resist or accept change (Scott, 2013).

Although institutions, by definition, are resistant to change because of the entrenched values, norms and routines that build over time, they do undergo change. Change can be caused by internal contradictions stemming from tensions among institutional logics (Seo and Creed, 2002; Reay and Hinings, 2005), emerge incrementally within the day-to-day activities of actors that subsequently get disseminated across a field (Smets, Morris and Greenwood, 2012) or result from an exogenous shock, such as a regulatory change that disrupts a settled institution and requires the negotiation of a new settlement (Clemens and Cook, 1999; Edelman, 1992; Micelotta and Washington, 2013; Rao and Kenney, 2008).

Considering the taken-for-granted, self-reproducing nature of institutions, it is not surprising that researchers have focused more on understanding the creation, disruption and transformation of institutions than upon maintenance processes. Yet, “the institutional work of maintaining institutions is both necessary and overlooked.... Even powerful institutions require maintenance so that institutions remain relevant and effective” (Lawrence et al., 2009: 8). Hence, several recent attempts have been made to map maintenance work (e.g., Adamson,

Manson and Zakaria, 2015; Currie et al., 2012; Dacin, Munir and Tracey, 2010; Lawrence et al., 2009; Lok and de Rond, 2013; Micelotta and Washington, 2013). These studies highlight how actors who benefit from existing arrangements respond to threats of change by trying to maintain the status quo. In particular, it has been shown that “individuals who belong to higher status social groups most often benefit from existing social arrangements” (Battilana, 2006: 663) and are thus especially likely to resist institutional change (Currie et al., 2012; Ferlie et al., 2005, Suddaby and Viale, 2011).

Nevertheless, it has been argued that we know far too little of who engages in maintenance work, and why and how they do so. These are still largely unanswered questions. Lawrence, Leca and Zilber (2013: 1025), however, offer “a prominent answer” to the first of these questions: “professionals and other actors associated with the professions.” The professions, they suggest, are a compelling starting point for studying maintenance work.

### **Professions and Institutional Maintenance**

Institutional theory has long recognised that the professions are important institutions in their own right (Scott, 2008). Nevertheless, professions compete for status and power because of the significant privileges that they bring (Abbott, 1988). Therefore, although recent work has provided examples of change initiated by professional associations or as emerging from the practices of professionals (e.g., Greenwood et al., 2002; Smets et al., 2012), mature professions, such as law, accounting and medicine, are essentially conservative (Greenwood et al., 2002) and are continually engaged in efforts to maintain their identity and thus their status (Currie et al., 2012; Micelotta and Washington, 2013; Scott, 2008).

Although the literature on identity per se is vast and growing (for a review, see Gioia, Patvardhan, Hamilton and Corley, 2013) studies have focused predominantly on organisational or individual identity. Work on professional identity, by contrast, remains “sporadic” (Ashforth, Harrison and Corley, 2008: 351). The need for more research in this area has been widely acknowledged (e.g., Ashcraft, 2012; Alvesson, Ashcraft and Thomas, 2008; Barbour and Lammers, 2015; Kodeih and Greenwood, 2014; Pratt, Rockmann and Kaufmann, 2006), yet insights into intra-professional identities and responses to professional identity threats have been notably lacking (Currie et al., 2012).

The fact that professions are institutions makes it problematic to directly transfer insights on organization identity to the professions. While a profession, as an institution, is a source of



institutional logics that provides frames of reference for individual professionals to interpret their reality, define their values and interests, and provide justification for the question of “who am I?”, it is also a part of a broader institutional field that can be the source of several other institutional logics. This brings an underlying complexity that has yet to be examined.

Micelotta and Washington (2013: 1169), for example, show how Italian lawyers “refused the imposition of a professional model that does not reflect the actual identity and practices of the profession.” Other studies have similarly shown that whether a new institutional order is perceived as aligned or misaligned with identity will affect whether its implications are perceived as opportunities or threats and thus will shape the level of resistance (Creed, DeJordy and Lok, 2010; Gioia et al., 2013). Professional identity, in other words, is central to the interests of a profession and any change perceived as threatening that identity can be expected to trigger maintenance work.

However, it is important to note that, despite the commonly held monolithic perception, professions are not homogenous (Abbott 1981, 1988; Currie et al., 2012; Ramirez, Stringfellow and Maclean, 2015; Stringfellow and Thomson, 2014). Within most professions, status hierarchies specify and define intra-professional communities with their own identities, interests and privileges. How these intra-professional differences are invoked and affected during processes of institutional change, and how they might shape responses to those changes, has largely been unexplored. Rather, most studies have considered professions to be homogenous entities in which members share a common identity, ideals and intentions. As such, it is implied that possible tensions caused by intra-professional status hierarchies and intra-professional identity differences are insignificant and can be discounted. This, as we show below, is problematic.

## **METHODS**

### **Empirical Context**

The Scottish Parliament passed the Courts Reform (Scotland) Act on 7 October 2014. The Act was based on Lord Gill’s review of the Scottish legal system, an investigation initiated in 2007. Gill’s concern was to “review the provision of civil justice by the courts in Scotland, including the structure, jurisdiction, procedures and working methods” (Gill, 2009: 1) with “a view to improving access to justice in a manner which was effective, efficient and

proportionate” (Scottish Civil Court System Briefing, 2014: 6). Gill expanded on his position in the prelude to his Report:

The structural and functional flaws in the working of the Scottish Civil Courts prevent the courts from delivering the quality of justice to which the public is entitled. The Scottish Civil Courts provide a service to the public that is slow, inefficient and expensive. Their procedures are antiquated and the range of remedies that they can give is inadequate. In short, they are failing to deliver justice. Public confidence in our system is being eroded. The much admired qualities of fairness, incorruptibility and expertise of our judicial system will have little significance if the system cannot deliver high quality justice within a reasonable time and at reasonable cost (Gill, 2009: i).

The justice system in Scotland is divided into two parts, criminal and civil. The criminal justice system deals with those who are suspected of engaging in criminal activity. The civil justice system is designed to enforce and protect people’s legal rights and to regulate disputes regarding these rights between two or more parties (Scottish Civil Court System Briefing, 2014). As such, the civil justice system covers cases involving personal injury, human rights, asylum and immigration, education, health, social security, the creation and enforcement of contracts, divorce and separation, ownership disputes, wills and inheritance, enforcement of debt, commercial matters, and the like.

The Scottish civil justice system has long had the court structure depicted in Figure 1. The Court of Session is Scotland's highest civil court and has traditionally dealt with all types of civil cases. The Court of Session is divided into the Outer House and the Inner House. The Outer House hears cases that have not previously been to court, and the Inner House is the appeal court, hearing civil appeals from both the Outer House and the lower-level Sheriff Courts. Appeals from the Inner House may subsequently go to the Supreme Court of the United Kingdom, located in London (Scotland-judiciary.org.uk, 2015).

Insert figure 1 about here

Sheriff Courts, traditionally located in every city and many larger towns, have jurisdiction over a wide range of civil and criminal matters. The Sheriff is a judge who hears cases in first instance. The Sheriff Courts deal with the greater part of civil court business (Scottish Civil Court System Briefing, 2014) and thus it has been claimed that “Sheriff Courts are the most important courts in Scotland” (White and Willock 2007: 97; Scottish Civil Court System Briefing, 2014).

In Scotland, legal cases are predominantly argued by solicitors and advocates. While solicitors represent their clients in the Sheriff Courts, they are excluded from the Court of Session. However, some solicitors qualify as solicitor advocates, allowing them to represent clients in the higher court. Advocates have traditionally enjoyed the right to appear in any Scottish court if they are “instructed” by a solicitor.

In his review, Lord Gill (2009) highlighted several apparent problems with the civil justice system, including significant delays in Civil Court hearings with frequently postponements; a lack of continuity and consistency of decision making in Sheriff Courts; increasing use of inexperienced temporary judges resulting in inconsistent decision making and poor case management; outdated technology resulting in widespread inefficiencies in the conduct and management of civil cases; large overlap in the jurisdiction of the Court of Session and the Sheriff Courts resulting in increased costs; and, higher courts judges dealing with intellectually and technically very simple cases instead of complex and urgent matters requiring their expertise. To address these problems, Gill (2009) proposed holistic changes to the structure, jurisdiction, procedures and working methods of the judiciary, including;

- The jurisdiction of the Sheriff Courts will change. Rather than the previous £5000 limit, Sheriff Courts will hear claims of up to £100,000.
- A third tier of judges – Summary Sheriffs, will be introduced. They will deal with straightforward claims below £5000 in a process known as a “Simple Procedure”.
- A specialist Personal Injury Court and a Sheriff Appeal Court will be created.
- Support for party litigants will be improved with more on-line information, better in-court advice services and provision for “lay representation.”
- Court procedures will be modernised. Use of information technology, such as conference calls and electronic evidence submissions, will be increased to improve efficiency.

Implementation of the reforms is expected to be completed at the end of 2016, resulting in a new structure, as shown in Figure 2.

Insert Figure 2 about here

## **Data**

As we noted above, this paper is part of a larger, ongoing study that is examining the institutional underpinnings, and outcomes, of the Scottish law reforms. Longitudinal data are being collected in real-time, predominantly from three sources: semi-structured interviews,

documents, and non-participant observations. The data used here have been coded and analyzed in ways consistent with methods outlined by Miles and Huberman (1994) and Gioia, Corley and Hamilton (2013).

The paper draws upon twenty-one interviews conducted with representatives from all of the groups affected by the changes, including advocates, a Clerk of Court, solicitors, solicitor advocates, a Sheriff Judge, a Project Manager working in the Faculty of Advocates (the professional body to which all advocates in Scotland belong), a member of Reform Scotland (an organisation that took part in the design process of the reforms), two Members of the Scottish Parliament, and two High Court Judges. Interviews lasted between sixty and ninety minutes and were conducted by two members of the research team. Interviews were held in offices or meeting rooms selected by the participants. All interviews were recorded and transcribed, except one at which extensive notes were taken.

As secondary data, seventy-one written submissions to the Scottish Government have been analysed. These written submissions were made by various stakeholders – including advocates, solicitors, academics, judges, leaders of affected Non-Government Organizations, and different professional bodies – in order to share concerns, ideas and recommendations. Three public speeches were also analyzed. Two of these were addressed to solicitors and explained how the reforms would positively affect them. The third speech, to all members of the Scottish Justice System, explained the need for the reforms and revealed the time line of their implementation.

Finally, we extensively documented our observations whenever we attended meetings and interviews. These data included working practices, architectural design of buildings, and details pertaining to the activities and informal comments of those being interviewed.

## **FINDINGS**

Following our data analyses, three main themes emerged as important in understanding the impact of the law reforms on the legal profession. First, it is very clear that, within the legal profession, there are communities with different status, and that these status differences along with associated professional identities heavily influenced the ways in which the reforms were perceived and enacted. Second, these intra-professional differences have resulted in different bases of opposition to the reforms. Surprisingly, given that the reforms were intended to provide more opportunities to solicitors, we found that opposition to the reforms was

universal. Third, despite this overwhelming opposition, the legal profession was unable to mobilize a coherent program of maintenance work as has been possible in other similar highly institutionalized settings. Again, we found status and identity as highly salient in understanding the reasons for this. We next explain each of these emergent themes in more detail.

## **Different Status Communities**

Contrary to much of the research that has viewed professions as homogeneous, we found significant intra-professional differences across the legal field. Here we focus predominantly on advocates and solicitors, the groups who practice law and were most affected by the law reforms. Almost all of the interviewees defined their roles, professional interests and status in terms of their specialised branches of the legal profession. We assess the different status communities, and note how these differences influenced their perception of change.

### ***Advocates***

Advocates consistently stressed how their training, legal expertise, and their strong “professional traditions” set them apart from others in the legal profession. These characteristics also provided the bases for their perceived high status. Both interview and document analyses revealed a strong belief in how advocates feel that their work is important, complicated and distinctive. Further, they almost always defined themselves in comparison to solicitors with extensive explicit and implicit references to their differing status, as in this description of the characteristics of advocates by Brandon<sup>3</sup>, an experienced advocate:

If an advocate, which is different to being a solicitor actually, if an advocate tells you something, generally speaking, you can rely on that, and trust what they say is accurate.... And honesty, I think, is the other one.... And a mutual respect, so that I would not denigrate a fellow Member of Faculty. And it's less aggressive [than being a solicitor], and sometimes solicitors can fall out with each other.

While explaining the consequences of working alone, George pointed out how advocates have higher status with the public:

So there are many pros and cons, but being self-employed as an advocate definitely carries kudos, if you like, in the public's mind.... I think people realize that it is quite an important role. Because you're advising the solicitor and you're advising the client, so, in that sense, you have to be confident in your own ability

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<sup>3</sup> All names used in the paper are pseudonyms.

and your own advice, whereas if you're a solicitor, you can always go and ask a partner, and it's a collective thing.

Having professional training, dealing with very complex cases, and having expert skills and knowledge were repeatedly mentioned as important aspects of an advocate's professional identity. Further, advocates that we interviewed repeatedly reflected on their commitment to higher professional standards than solicitors. James, an advocate, explained:

If you're asked for a written opinion about something, you could spend a whole day on it. And frequently, when I'm drafting things, I rewrite them three or four times, and change them, and change them again. Now, I probably wouldn't have done that as a solicitor. It's because I know that my piece of work is going to get sent to the solicitor and sent to the client and probably to the court at some point if it's a court document. So it has to be absolutely as good as it can be.... Advocates are people who are on a completely higher level [than solicitors].

Another advocate, Charles, while giving an example of the negligence of a solicitor in a case, explained how advocates monitor themselves to meet professional standards, and how these standards are reproduced:

Now, most advocates would not [make that mistake].... The informal restrictions or pressures on the way in which we handle ourselves, are more concentrated on us because our training is more involved, and more intense... and because we, traditionally, have more contact with judges, and finally, because up until the present, all judges have been members of the Faculty of Advocates professionally before they went on to the Judicial Bench, or the Court of Session Bench. It's more of a step for us to fall beneath those professional standards.

He also explained how solicitors have to deal with clients and take responsibility for billing and payments, something considered beneath the role of an advocate:

We wouldn't want to [access clients directly]. We don't get direct access to clients, but also we don't have to handle their money, which is a tremendous ease of burden from our point.... That's all done for us by the solicitors.

The tradition and gravitas attached to the identity of advocates was also apparent in the way that the Faculty of Advocates defined itself in its submission to the Scottish Government during the consultation process before the Act was passed:

The Faculty of Advocates is Scotland's independent referral bar. It is also one of Scotland's great national institutions. Before and since 1707, the Faculty has been central in developing and preserving Scots law as an independent legal system. Its members (including Sir Walter Scott and Robert Louis Stevenson) have contributed significantly to the Scottish Enlightenment and to Scottish culture

generally. It was thanks to the donation by the Faculty of some 750,000 books that the National Library of Scotland was established in 1925.

The Faculty proudly defined itself as an independent, distinctive, and national institution with a long history of contributing to the betterment of society. Our non-participant observation data confirmed that advocates are very proud of being part of the Faculty. For example, when we conducted interviews in the Law Chambers, we were always given a tour of the building and told stories about the ancient traditions that members still follow.

While advocates are proud of their status and traditions, members of other branches of the law profession emphasise, and resent, what is perceived as elitism. For example, solicitors that we interviewed emphasised to us that the Faculty of Advocates has traditionally been dominated by men with similar backgrounds. Aaron, a solicitor, explained:

The Bar has undoubtedly been privileged. It has been largely male, it has been largely private or very privileged public schools. It has been largely wealthy and it has been largely self-confident males with very good and expensive educations. ... there are many more women now but their CVs mirror the men. But the Bar has had all these privileges.... As a solicitor, even as an inexperienced one, you are very aware of the fact that you can't go to Faculty of Advocates Library. You are not allowed to go in there, unless you have permission. You are just like any other member of the public.

Another solicitor, Garret, pointed made similar observations:

In Scotland, it is not that long ago that we did not have any female judges. We have more [now], but...there is still a long way to go before we have anything like parity. And it is something which I think that, you know, probably fosters the view of elitism, because it is mostly men, mostly going to private schools, most have gone to certain universities, most have a certain social background.

Thomas, a solicitor, explained it this way:

That is something that I have been very aware of for the last twenty years or more that the Bar was so archaic in its structure. It did have excellence but it was so archaic: the clothes, the wigs, the traditions. The idea that if you were a training master and your advocate was such and such a person, you would be a kind of family, with all the other people who had been trained by that person... right up to the judge.... To me it's redolent of English private schools and elitism.

He went on to suggest that the elite status of advocates is now under threat.

These traditions will slowly wither.... Counsel<sup>4</sup>, with an effort to survive, will become more and more like solicitors who see the clients every day and answer their questions and try to simplify their explanations.

However, a Member of the Scottish Parliament, Keene, interpreted the possible impacts of the reforms on the profession in a different way:

Advocates are the stars, they are the elite. Advocates will always be the elite because they are the cream, they are the very best. I think what we will see is – after the reforms and over time – advocates will find niche work and they will always be there.... The Bar will [continue to] exist as an elite.

### *Solicitors*

While advocates based their identity and status on tradition, legal expertise, and elitism, solicitors, by contrast, defined themselves by continually emphasising the importance of their clients. Garret, a solicitor, reflected that the defining characteristic of solicitor is, “Doing your best for the client. We have a duty to the court, we have a duty to the client.”

Solicitors also emphasized that they are the ones who have responsibility for meeting, communicating, and managing the relationship with their clients. Aaron, contrasting solicitors with advocates, used an analogy with the health profession:

In a jurisdiction, when you have a split legal profession, as in the UK including Scotland...a solicitor is a bit like a GP and an advocate is a bit like a specialist, medical consultant. Advocate, or barrister, is somebody that your GP sends you to.

He added how solicitors are better at explaining things than advocates:

When I have meetings with counsel, I am surprised still in 2015, sometimes to see that they are often hopeless for explaining things. They use jargon, Latin words, a number of counsel I have seen them say to a client ‘Now Mrs. Smith your solatium is worth £10,000.’ And she is immediately blank. She has no idea what solatium is. But she doesn’t say. I immediately intervene and explain things. Why does not she or he be sensitive to the fact that the client won’t know what it means? It is jargon as far as the client’s concern. Why does he or she not know that? I still like the contact with the client even though it can be very infuriating sometimes.... I like engaging with the client at a basic level.

Thus, language is an important point of distinction, both functionally and symbolically. Advocates see technical, even arcane, language as a mark of their expertise while solicitors use more accessible language to retain a close proximity to their clients.

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<sup>4</sup> The terms advocate, barrister, counsel and Member of Faculty were used interchangeably in the interviews.



### ***Solicitor Advocates***

As with advocates and solicitors, solicitor advocates also define themselves by comparison to other branches of the legal profession. Here, however, perceived differences were not as starkly drawn. For example, one solicitor advocate told us:

I really don't see much difference between the various branches of the profession, duties to the court, duties to the client, it's pretty much all the same really. It's just that the jobs are a bit different, the functions are a bit different. I mean the Faculty of Advocates might argue that they've got different codes of practice that they have to have regard to different ethics. I don't there is much of a difference.

Clearly, though, there are some significant differences, notably in how work is obtained, and where it is carried out, as Scott, a solicitor advocate, explained to us:

Well, a solicitor advocate will be somebody usually, in fact almost always, who is working in a particular legal firm. And more often than not, the work they are being instructed in will come from within that firm. Whereas an advocate is a lone gun who is out there for hire.... They don't have the benefit of being a member of a larger firm.

Solicitor advocates thus defined themselves, and derived their status, from their membership of a particular firm, and the firm's values, as Taylor explained:

I'm thinking XYZ [firm name], we're seen as being a firm which tends to wear its heart on its sleeve a bit. We do act for all the major trade unions, bar a very tiny number. We believe that our clients should get their maximum damages in minimum time.

As we can see from the discussion above, the legal profession is not homogenous, but composed of distinct sub-communities. Though acknowledging their common membership of the legal profession, they differentiate themselves on the basis of tradition, legal expertise, and membership of an exclusive community (advocates), proximity to clients (solicitors), and membership of particular legal firms (solicitor advocates). This differentiation is exacerbated and enshrined in a status hierarchy that had significant implications for how the groups responded to the proposed reforms.

### **Bases for Opposition**

Given the differences in status and privilege of the professional communities, it is not surprising that each group held different views on the reforms being introduced. However, they were united in opposing the charges, albeit for different reasons.

Advocates constitute the legal community under most obvious threat from the reforms. Indeed, Lord Gill (2014: 7) made it very clear that he expected the reforms to open to solicitors “a large tranche of work” that had previously been only available to advocates. This was clearly perceived as a direct threat to the status of advocates, most notably in terms of the business that they would in future be able to secure but also because it would allow more complex cases, previously the sole preserve of advocates in the Court of Session, to be contested by solicitors in lower Sheriff Courts. In line with Gill’s reasoning, advocates consistently referred to their profession as under threat. Charles, an experienced advocate, stated:

There will be a disproportionate effect that will fall on the senior branch of the legal profession, which is mine. The use of counsel, use of advocates, barristers in cases will increasingly be seen as unnecessary, [an] additional expense.... That will... undermin[e] the quality of representation available to people.

Another advocate, George, addressed the possible impact of the reforms on the income of advocates and on the population of the profession:

A lot of my work is in higher value cases, fatal cases, medical negligence cases, so [the threshold change] wouldn't have the biggest impact on me. But some other people, it would have a huge impact.... In terms of income, it could reduce it by more than half.... Individual advocates are likely to have to leave the Bar. Scotland already has a small Bar relative to its population. That small Bar would become even smaller. This would diminish the choice and quality of representation available to litigants throughout Scotland.

Advocates were not the only ones pointing to the possible negative impacts of reforms on advocates. A solicitor, Garret, emphasised the need for advocates to change in order to survive:

I think advocates have to change the way they work. They will have to adapt and I don't think there will be enough work for the current number of advocates to be sustained.... I think, overall there may be an effect on skill sets, because relatively less advocates will be appearing in court and that has an impact on their developing their skills.

Another solicitor, Aaron, provided insight into why solicitors were unhappy with the reforms explaining that the change will increase the competition between solicitors and advocates, undermining a status quo in which advocates and solicitors each understand their roles in the legal system:

I supposed that inevitably the competition is going to mean that two branches of the profession will be similar. Whether they become equally good or whether they become equally bad could be argued. Advocates will have to struggle and fight more to find work.... Two branches of the profession are going to become more alike, and they are going to become much more in competition rather than solicitors feeding work to the counsel.

In their submission to the government during the consultation process, the Faculty of Advocates expressed an additional concern that the reforms would threaten the continued reproduction of skilled professionals:

There is an additional, potentially significant, long-term systemic effect for the future health of the Scottish legal profession. There are, today, far fewer opportunities for advocates to appear in court early in their careers than was formerly the case. One of the purposes of the Bill is to remove from the Court of Session “low value” cases of all classes. By the nature of things, it may be in relatively straightforward cases at the lower value end of the spectrum that advocates can obtain the experience early in their careers which equips them, as their careers develop, to undertake higher value complex litigation. Over the long run, then, these proposals would prejudice the continuing ability of the system to produce the experienced and highly skilled advocates who are needed for those higher value and complex cases.

Unsurprisingly, all of the advocates that we interviewed vehemently opposed the reforms. Several also questioned the central tenet of the need for change, as exemplified here by Phillip:

In the context of what Lord Gill set out to do, his idea was improving access to justice. Most of us in the Faculty feel that that's laughable because it will mean that people will not have access to counsel, and the expertise that the Faculty provides, and will have to rely on solicitors who have much less experience, much less knowledge.

Similarly, a solicitor advocate, Taylor, bluntly suggested that, “The idea of increasing access to justice [through these reforms] to me seems like breath-taking hypocrisy.” Several of our interviewees held that the traditional civil justice system had worked well and that radical change was unnecessary. For example, Phillip, when asked about the key drivers of the reforms, stated, “I really don't know because the system actually works.... the system actually works really, really well.” Samuel, a solicitor, similarly opined, noting, “I wouldn't say it's perfect, it's not. But it works extremely well.”

In dismissing Lord Gill's claims of improving the civil justice system, solicitors and advocates also felt that the reforms were actually an attack on the status of some of their

work. For example, Scott, a solicitor advocate dealing with personal injury cases felt that personal injury cases were not considered sufficiently important to be heard in the higher court:

I see a degree of elitism behind these reforms, which is pushing my clients out of the Court of Session into a potentially worse forum for them, in which they may recover less of the cost to obtain redress, and the result is that they end up having to pay more. I think where personal injury is concerned there was a view on the part of some judges that they didn't want to see personal injury work in the Court of Session anymore. They felt it was beneath the court.

George, an advocate also specialising in personal injury cases, provided a similar opinion:

I think the Lord President [Gill] doesn't think personal injury work is something that is particularly difficult and should be heard in the highest court in Scotland.... but personal injury work can be very difficult and complex.

### **Maintenance Failure**

The profession was united in opposition to the reforms. Its members shared a lack of conviction that the reforms would increase access to justice; even solicitors, who apparently had most to gain from the reforms, felt that the changes were unnecessary, and in fact would diminish the standing of their work. However, there was a distinct absence of any concerted effort to coordinate a response across the legal profession. As one advocate explained: "There may have been some informal conversations, but there were too many different vested interests for advocates and solicitors to join together."

Aaron, a solicitor, compared the ability of his branch of the profession to take collective action with advocates' inability to do so.

Solicitors have been much, much better at campaigning, campaigning for public inquiries. Advocates cannot do that because they are in a collegiate structure where the Dean of Faculty speaks on behalf of all of them.... As a solicitor, good or bad, somebody like me when there is a Gill inquiry, or any other inquiry, we feel fairly free to write a letter as an individual. A solicitor says, 'this is what I think'. No matter how good or bad, the views may be expressed. But advocates very rarely, even now, break the ranks, and send off their own individual views. If you look at the Gill responses, you can see a few that responded, not two hundred who could have. Even now when their professional future and livelihood has been threatened, they still did not break the ranks for one or two hundred of them to write individual letters to the Gill committee.

Phillip, an advocate explained this position:

So Faculty would be resisting it, but the Faculty is also mindful of its place in public life in Scotland, and those who are in control of the Faculty are very polite in what they say, and so they wouldn't be at the forefront of the resistance. Though they would be questioning about the object of reforms and how these were to be achieved.

Our findings also show that the slow implementation process created an uncertainty that resulted in professionals being unable to foresee the likely outcomes of the reforms. Several participants addressed this issue explicitly. For example, a solicitor advocate, Scott, told us, “We are left at the moment in a state of ignorance. We don’t know what to expect. We don’t know what the fees will be in the court. We are in the dark.” Garret, a solicitor also touched upon the uncertainty and its consequences, “I suppose you have to adapt as best you can. You have to try to anticipate what is likely to happen. There is a lot of concern about what is going to happen.”

Paul, an advocate, explained how hard it is to perform in uncertainty and deal with the changes: “We are in a position of deep uncertainty. So what's to be done with that? I don't know.” The result was a form of paralysis in which coordinated opposition to the reforms proved impossible.

In sum, therefore, advocates and solicitors, while they opposed change, lacked any coordinated action. There was no mechanism in place for a coherent, universal response; rather, voices from the legal profession were fragmented and thus could not carry the weight that was required to prevent the reforms being implemented.

## **DISCUSSION**

We contribute to the literature on institutional theory by offering insights into intra-professional segmentation and its consequences for institutional processes. In so doing we expose the role of status in intra-professional dynamics, uncover those factors that hinder institutional maintenance work, and highlight the importance of professions as institutional agents.

### **Intra-professional Status and Institutional Change**

Our research indicates that the reforms will disturb not only the deeply entrenched institutional logics within the field, but also professional and organizational privileges,

identities and the responsibilities of professional groups. The overt intent of the changes was to reduce costs, increase efficiency, and make the civil justice system more accessible to members of the public. It was also expected that the reforms would democratize the legal profession by providing opportunities for solicitors to develop expert knowledge and increase their domain of professional jurisdiction. However, in so doing, advocates have been threatened with the loss of their well-established privileges. Thus, for them, the reforms were profoundly undesirable. As members of a distinctive profession, this constituted a singular challenge to their professional identity. Given the threat to their status and privilege the dissatisfaction of advocates is not surprising. What was unanticipated was the inability of advocates to effectively carry out the type of maintenance work that has been characteristic of legal and other professionals in similar circumstances (e.g., Greenwood and Suddaby, 2006; Micelotta and Washington, 2013).

We were also surprised that solicitors were opposed to the reforms. For them, the changes are perceived as inconvenient, unnecessary and based on insufficient research. They interpreted the intentions behind the reforms as an attack on the field of personal injury because their cases would be heard in lower courts by less skilled judges. In other words, advocates and solicitors see the reforms as threatening their perceived expertise and thus constituting a challenge to their professional identity (Lamont and Nordberg, 2014). Following Petriglieri (2011: 644), the reforms were “appraised as indicating potential harm to the values, meanings, or enactment of an identity”. This was manifest in concerns about professional jurisdiction, values, future of their profession, income, and ability to reproduce traditions.

We found that these pronounced threats to the identity and status of different branches of the legal profession, and high levels of uncertainty, significantly sharpened intra-professional differences. Members of different groups defined their opposition by positively distinguishing themselves from other segments of the legal profession. Advocates, in particular, responded to the proposed change by differentiating themselves from solicitors and emphasizing their distinctiveness, in function and status, at every opportunity. The Faculty of Advocates followed the same path in written submissions. Further, solicitors highlighted the difference between them and advocates, while resenting the intra-professional status differences and deeply rooted elitism among advocates.

The unsettlement in the field was intended to disturb the status hierarchy within the legal profession by expanding opportunities for solicitors at the expense of advocates. Several of our interviewees commented that, indeed, the reforms will close the intra-professional status

gap between advocates and solicitors. Therefore, the reforms, as a conduit for institutional change, are expected to increase competition between advocates and solicitors. This potentially strengthens the identity threats to advocates. Tajfel (1978) argues that groups are more prone to compare themselves with others when their identity is threatened. Ashforth and Mael (1989) similarly argued that established and affirmed high status groups are less likely to feel threatened and, therefore, less in need of positive distinctiveness. Our findings provide an example of low status (solicitors) *and* high status (advocates) groups seeking to retain the distinctiveness of their positions. Interestingly, then, status threats are not restricted to just those at the elite end of the profession, leading to our first proposition:

P1: Lower status groups will not automatically seek change even when it appears to be in their professional interests to do so.

Theoretical and empirical exploration of the links between professions, identity and institutional change remain scarce. We address this lack of attention by demonstrating that identities within a profession are not homogenous as often assumed. Rather, there are significant differences that provide an important lens through which actors interpret institutional change and decide whether to accept or resist it.

Further, our findings demonstrate how intra-professional identities can emerge in response to status threats, something acknowledged as particularly lacking in the literature (Currie et al., 2012; Ramirez et al., 2015). In particular, we show that groups respond to such threats by critically defining themselves against competing groups. Thus, we propose:

P2: Externally enforced institutional change, and accompanying threats to status, can result in sub-groups of a profession emphasizing intra-professional identity differences.

### **Uncertainty, Intra-Professional Differences and Institutional Maintenance Work**

Institutional maintenance work requires substantial effort, especially during externally imposed institutional change. Yet despite the fact that, “the real mystery of institutions is how social structures can be made to be self-replicating and persist beyond the life-span of their creators” (Lawrence and Suddaby, 2006: 234), research on institutional work has predominantly focused on the creation, disruption or transformation of institutions with institutional maintenance work much less developed. Recent studies on maintenance work (e.g., Anderson et al., 2015; Currie et al., 2012; Dacin et al., 2010; Lawrence et al., 2009; Lok and de Rond, 2013; Micelotta and Washington, 2013) reveal that maintenance is not a

process of straightforward replication as is often assumed in conventional representations of self-reproducing institutions. Particularly during times of externally imposed institutional change, maintenance work requires active and strategically coordinated resistance to change. Interestingly, however, in our case resistance was weak, despite the different segments of the profession being less than convinced of its merits. Particularly surprising was the inability of advocates to mount a more effective maintenance strategy. The reasons for this constitute an important contribution of the paper.

Considering the essentially conservative and powerful nature of professions (Greenwood et al., 2002) and their continuous efforts to maintain the status quo to keep their jurisdictional power along with the associated social and financial privileges (Abbott 1988; Larson, 1977), our findings present us with a paradox whereby very powerful and structured professional groups with opportunity and resources *failed* to mobilise effective resistance. Although the reforms were strongly opposed by advocates and solicitors, resistance was surprisingly mild. We found two underlying reasons for this failed institutional maintenance: intra-professional status differences and deep uncertainty created by slow implementation of the reforms and weak intra-professional communication.

Research that recognises the importance of collective and collaborative action in institutional work efforts (e.g., Lawrence et al., 2002; Lounsbury and Crumley, 2007; Mair and Ignasi, 2009; Perkmann and Spicer, 2007; Wright and Zammuto, 2013) has generally focused on institutional entrepreneurship. The process and importance of “achieving sustained collaboration among numerous dispersed actors to create new institutions or transform existing ones” (Wijen and Ansari, 2007: 1079) is well-recognized in such processes of institutional change. Our study shows that institutional maintenance work also requires collective and collaborative intentional efforts, but that it may be difficult to accomplish even when there is a single dominant profession involved, because of intra-professional stratification. This leads to our third proposition:

P3: Institutional maintenance work requires strong, coordinated action across intra-professional groups if it is to be effective.

The different intra-professional groups could have united in resistance to the change and potentially maintained the status quo, as Micelotta and Washington (2013) found with professional groups in Italy. But the significant intra-professional status differences prevented effective maintenance work. Thus, we contend that there must be some form of collective



identity, even if only on a temporary basis, for maintenance to occur. Without this, organizing around a shared purpose (Cornelissen, Haslam and Balmer, 2007), or constructing a plan of action (Gecas, 2000), will likely prove extremely difficult. However, in our case, status differences prevented even a temporary alliance, leading to our fourth proposition:

P4: Status differences that foment intra-professional rivalries are likely to prevent coordinated maintenance work, even when it is perceived as being in the best interests of all involved.

Further, we found that uncertainty hinders institutional maintenance work by creating a form of paralysis. Members of the Scottish legal profession could not perform maintenance work because of the lack of specific information regarding the implications of the reforms. This created an ambiguity of outcome that, when allied to the mistrust among different groups, prevented collective action. In the institutional work literature, uncertainty has been presented as enabling the creation of institutions because “the possibilities for strategic action are the greatest” in fields without any structure (Fligstein, 1997: 401), that is, when the degree of uncertainty is very high. Further, Phillips, Lawrence and Hardy (2000) suggest that unstructured or under-organized contexts likely spawn institutional entrepreneurship. Our work offers an extension of this line of theorizing. That is, while uncertainty is important for creating the ambiguity necessary for change to occur, it hinders the ability of actors to maintain or repair institutions because of their inability to foresee potential change outcomes. Therefore, we propose that:

P5: Uncertainty can provide opportunities for institutional change, but it is likely to hinder attempts at institutional maintenance.

## **CONCLUSION**

Institutional logics in the Scottish Civil Justice System have been largely settled for over 150 years, with well-established institutions, interests, values, identities and expectations. The upcoming reforms are disturbing not only the deeply entrenched institutional logics within the field, but also professional identities and status hierarchies. In examining how these processes unfurl, we have offered three significant contributions. First, we demonstrate how identities and status within a profession are not homogenous, as often assumed in the literature. There are significant differences that determine how interactions take place. Second, we show how identity differences are sharpened rather than dulled when an

externally imposed change threatens different levels of status. Third, we unveil how intra-professional identity differences and high levels of uncertainty are two of the factors that hinder institutional maintenance work. These contributions, and the corresponding propositions above offer, we feel, a potentially fruitful and important, line of future research.

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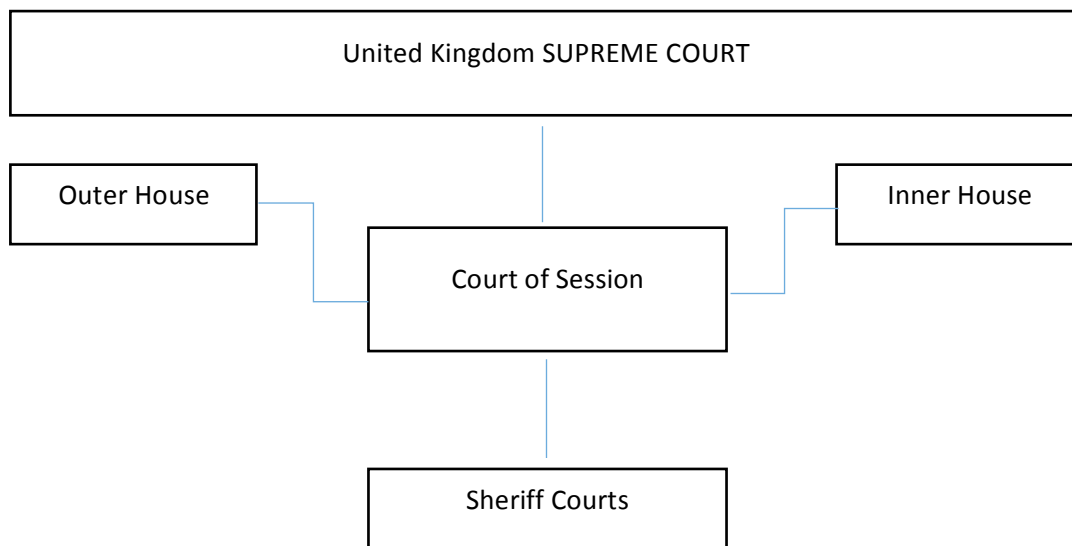
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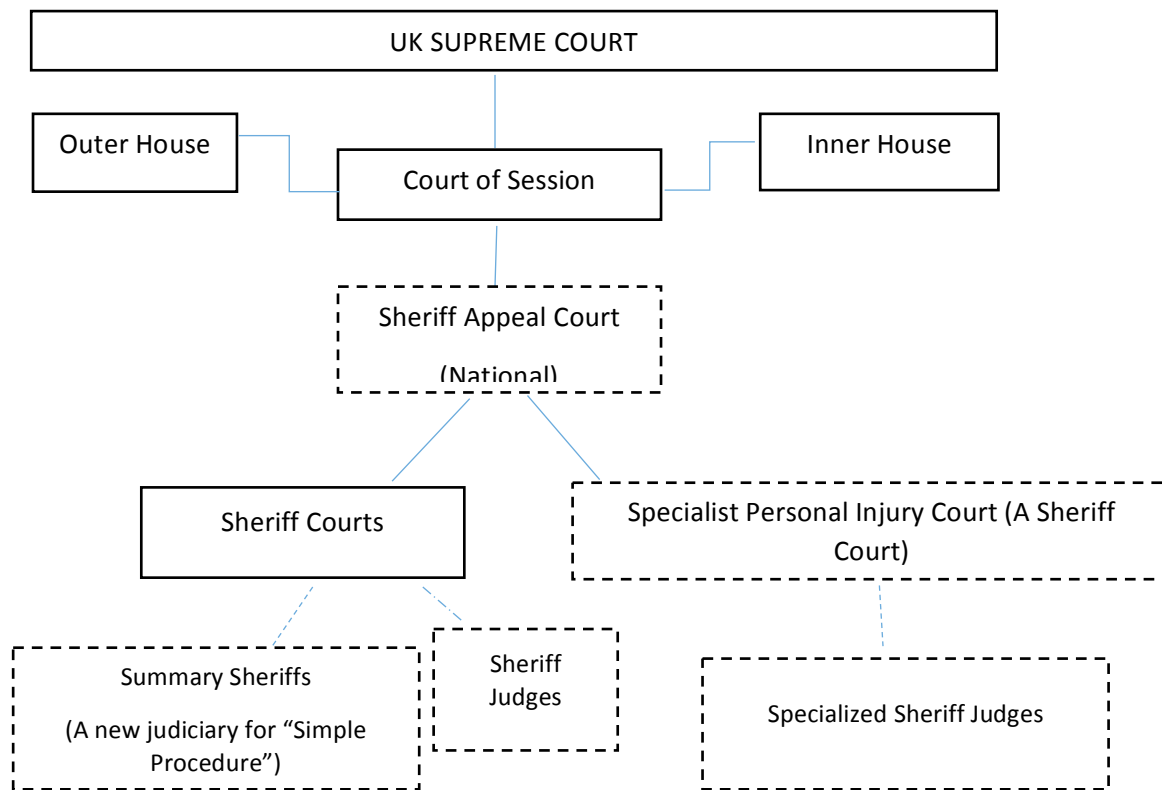
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**Figure 1. Structure of the Scottish Civil Justice System Prior to the Reforms**





**Figure 2. The Revised Structure of the Civil Justice System**



Dotted lines indicate new judicial bodies.